Remarks by
Commissioner Curt L. Hébert
on
Alliance Transco

May 17, 2000

Today, we accept most of the compliance filing the Alliance Companies (Alliance) submitted, in their effort to form a stand-alone, for-profit transmission company (Transco). The Commission agrees with the principle – self-evident to me - that the management owes *no* fiduciary duty to the outside interests of passive owners.

In the December order conditionally approving the Alliance, the majority questioned the owners' reservation of explicit rights to approve certain activities of the company. In response, the Alliance has decided, instead, to place a more detailed obligation on the management. Language aside, we find the Alliance's approach reasonable. The owners must cast their concept in a different way, however.

For example, instead of obligating the management to avoid bringing about a "long-term material dilution of the value" of the assets of the Alliance, as the Term Sheets propose, the passive owners could write the duty in terms of protecting the integrity of their capital investment, or "maximiz[ing] the value of the assets to the [passive owners] as a group." Slip op. at 27. We also allow passive owners to retain veto power over sales of assets, liquidation, dissolution, "winding up" and voluntary bankruptcy. Our decisions on these and other aspects of passive ownership will go a long way toward helping Transco's form.

I would have preferred accepting the Alliance's scope and configuration, on the basis of the graphics and maps the applicants submitted. Slip op. at n.69. In my dissent from the original order, I said I would have ruled that the Transco met that RTO characteristic, even without requiring this information. *Alliance Companies, et al.*, 89 FERC ¶61, 298 at 61,931-32 (1999) (Hébert , Commissioner *dissenting*). Nevertheless, I acquiesce in deferring the decision. The Alliance has yet to file its rates, so some further delay will result in any event.

In the meantime, as the order mentions, Alliance has taken the lead in working out co-ordination with neighboring systems. Slip op. at 32-33. I have the fullest confidence that contractual arrangements a for-profit Transco makes will work. As a business, a Transco has every reason to grow to its proper scope. It will also make the proper agreements to increase transactions on the grid. Analogously, companies in the transportation industry for decades have operated under agreements that require each party to honor the tickets of another. Airlines and railroads give passengers "through rates" that allow travel over different carriers on the many legs of a journey.

I agree with Commissioner Massey, however, that handling so-called "seams issues" internally may increase efficiency in a particular case. Creating the right organization takes time. Meanwhile, the Alliance must do the best it can. The contractual approach still improves the *status quo*. In the long run, waiting may bring better results than hastily stitching together an independent system operator. Rather than making the perfect enemy of the good, this approach heeds the adage "speed kills."

I disagree with my colleagues on one aspect of today's order. I would allow the five Alliance transmission owners to keep the 25% class ownership they propose. I would grant rehearing on that issue.

The majority says, "The 25% voting stock level for the Alliance Companies *could* allow the Alliance Companies to have and *appear to have* effective control over Alliance Publico, in violation of [the independence requirement]." (Emphasis added). I fail to understand how a 5% individual share - the amount Order No. 2000 called a "safe harbor" - changes into "control" when accumulated in a group of five.

As the Alliance Companies argue, and common sense dictates, the active owners would rather share in earnings from the Transco than give one of them profit from generation at the expense of the other four generators competing in the Midwest market. (Accepting the Alliance Transco as an RTO, which creates the "problem" of 25% active ownership for the majority, presumes that the area it encompasses, and in which the five companies sell, constitutes a market).

True, I voted for the 15% class ownership provision of Order No. 2000. I remind my colleagues, however, that the RTO Rule referred to the 15% as a "benchmark" that required us to make "case-specific determinations." Order No. 2000, mimeo at 222. The idea of individual control by less than a majority underlies securities legislation, such as the Public Utility Holding Company Act and the Williams Act. In contrast, the concept of control by an unaffiliated group, let alone 15% as an indicator, appears nowhere in corporate law. No empirical studies exist to support the notion of a 15% class control. Therefore, I think we should treat the benchmark as little more than intuition. Here, however, the majority turns the "benchmark" into a presumption that the Alliance must overcome. The Commission has no basis for taking such a leap.

Finally, as opposed to rejecting the 25% because it "could allow" control that the owners would "appear to have" in Alliance, I would accept the proposal for a more concrete reason. To stay within the class ceiling, the Alliance owners must reduce their individual shares to 3%. If the Transco grows to 15 owners, each could have 1%. At some point, the Alliance could have no more active owners. How ironic. At the same time the majority questions the scope of the Transco, as it did in December, the Commission stifles the means for the Alliance to grow. The majority cannot have it both ways. Either FERC

invites companies to join Transco's or we stifle RTO expansion. Again, the regulators misunderstand the marketplace.

In general, how will Transco's expand into the comprehensive regional organizations Order No. 2000 envisions if the majority remains preoccupied with 15% class ownership? I suggest this short-sighted view will become a self-fulfilling prophecy of doom. In certain regions, true RTO's may well turn out to be "a bust" if we show a lack of vision. In the Midwest, a region that has a history of diffuse grid operation and loose power pools, most of us see a need for many owners to combine assets and the necessity for the splintered transmission systems to grow in a Transco. These considerations sufficiently justify disregarding the benchmark on the facts of this case.

The events following the collaborative meting the staff presided over in Cincinnati shows us that whatever entity will ultimately emerge will need the flexibility to bring together the multiple systems existing in that region. I would encourage that development. Unfortunately, the majority relies on speculation and perceptions to make the goal we all aspire to – a viable, stand-alone transmission business – more elusive in the Midwest.

Perhaps the Alliance owners can solve the problem that requires them to retain active ownership: the need for compensation for their assets. Maybe a buyer with the requisite case will pay a lump sum up front. Or, the buyer will petition the Commission for an acquisition adjustment to allow the purchaser to borrow against higher, future earnings from an increase in the rate base. To me, the request would meet our standard for granting acquisition adjustments, "measurable consumer benefits." Order No. 2000 at n.661. If we grant acquisition adjustments to purchasers, the issue of active ownership, both individual and class, will dissipate. I hope we do it and it will. Based on the inflexibility toward active ownership exhibited in this Order, purchasers of the transmission grid must move in that direction and begin seeking acquisition adjustments. FERC must respond.